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CONFERENCE, CONCILIATION, AND PERSUASION: THE SEVENTH CIRCUIT'S GROUNDBREAKING APPROACH TO ANALYZING THE EEOC'S PRE-SUIT OBLIGATIONS

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INTRODUCTION

In 2013, the Seventh Circuit became the first circuit to explicitly reject an employer's contention that an employment discrimination lawsuit should be dismissed because the Equal Employment Opportunity Commission (EEOC) failed to engage in out-of-court negotiation efforts with the employer before filing suit.¹ In *EEOC v. Mach Mining, LLC*, the Seventh Circuit addressed the provision contained in Title VII of the Civil Rights Act of 1964 that requires the EEOC to satisfy certain conditions before it can file a discrimination lawsuit against an employer.² One of these conditions is that the EEOC must engage in "informal methods of conference, conciliation, and persuasion."³ The purpose of these pre-suit

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¹ *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 172–73 (7th Cir. 2013).

² *Id.*

³ *Id.* at 175.

negotiations, or “conciliation,” is to provide an opportunity for the EEOC to reach an out-of-court agreement with an employer to end the employer’s discriminatory practices without seeking a judicial remedy.⁴ The court held, however, that an employer’s claim that the EEOC failed to engage in conciliation is “not an affirmative defense to the merits of an employment discrimination suit.”⁵ That is, the EEOC’s alleged failure to comply with Title VII’s conciliation requirement is not grounds for dismissal of an employment discrimination lawsuit on the merits.⁶

The crux of the court’s reasoning in *Mach* is that the EEOC’s conciliation process is not—and should not be—judicially reviewable.⁷ The court stated that “[i]f the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient . . . our review of those procedures is satisfied.”⁸ In rendering this decision, the court stressed that the language of Title VII does not authorize judicial review of the conciliation process.⁹ Furthermore, the court found that there is no meaningful standard by which to evaluate conciliation, especially because Title VII’s confidentiality requirement prohibits disclosure of the details of the conciliation process in subsequent hearings.¹⁰ As such, it would be impossible for a court to make any meaningful determinations regarding the EEOC’s conciliation efforts because the court would not have access to relevant information regarding what happened during the conciliation process.¹¹ The *Mach* court also asserts that Title VII contraindicates judicial review of conciliation because it grants the EEOC absolute discretion in deciding whether to accept an employer’s offer of

⁴ 42 U.S.C.A. § 2000e-5(b) (2009).

⁵ *Mach*, 738 F.3d at 172.

⁶ *Id.*

⁷ *Id.* at 177.

⁸ *Id.* at 184.

⁹ *Id.* at 174–75.

¹⁰ *Id.* at 174–76.

¹¹ *Id.*

compliance.¹² In other words, courts do not have the authority to determine the sufficiency of the conciliation process because Title VII delegates that authority exclusively to the EEOC.¹³ The court also noted that, contrary to Mach Mining's contention, the EEOC's alleged failure-to-conciliate was not grounds for dismissal on the merits because "letting one party off the hook entirely" would be "too final and drastic a remedy for any procedural deficiency in conciliation."¹⁴

Thus, the *Mach* court held that courts may not conduct any investigation whatsoever into the adequacy of the EEOC's conciliation efforts.¹⁵ Indeed, the court even refused to recognize, as other circuits have, an implied "good faith" requirement in the EEOC's conciliation efforts.¹⁶ The court stated that it is too difficult to enforce a good faith obligation upon the EEOC because it would run contrary to the EEOC's unilateral authority to reject even the most generous conciliation offers.¹⁷ Ultimately, the result of the Seventh Circuit's holding is that the EEOC need not engage in extensive or thorough conciliation efforts.¹⁸ In fact, its efforts need not even be made in good faith.¹⁹ So long as the EEOC pleads, in its complaint, that it complied with Title VII's requirements, the court will deem the requirement fulfilled.²⁰

At first glance, it seems as though the Seventh Circuit, in its sharp divergence with every other circuit that has considered this issue, took an extreme approach to interpreting Title VII, and that the *Mach* decision has rendered the conciliation requirement utterly toothless. Upon closer examination, however, it becomes apparent that the Seventh Circuit's interpretation of the conciliation requirement is fully consistent with the text and purpose of Title VII. As the court noted, Title VII gives the EEOC full discretion in defining and

¹²*Id.* at 175.

¹³*Id.*

¹⁴*Id.* at 184.

¹⁵*Id.* at 184.

¹⁶*Id.* at 182–83.

¹⁷*Id.*

¹⁸*See id.* at 184.

¹⁹*Id.* at 176–77.

²⁰*Id.* at 184.

executing the conciliation process and effectively ensures that the conciliation process is insulated from judicial scrutiny by guaranteeing that the substance of the process remain confidential.²¹ Furthermore, as the Supreme Court noted in *Occidental Life Insurance of California v. EEOC*, “the individual’s rights to redress are paramount under the provisions of Title VII” and it is therefore ““necessary that all avenues be left open for quick and effective relief.”²² With the individual’s right to redress in mind, it would be counterintuitive to permanently bar an aggrieved employee’s discrimination claim based upon a mere procedural deficiency.²³ Title VII’s conciliation requirement, then, does not, and should not, create a hurdle that the EEOC must overcome before it can file an employment discrimination lawsuit. Rather, the requirement is best characterized as a procedural formality that gives *the employer* an opportunity to avoid litigation by voluntarily complying with Title VII’s requirements.²⁴

The first section of this note provides general background information regarding the conciliation requirement and Title VII. The second section provides an overview of how other circuits have addressed judicial reviewability of conciliation. The third section analyzes the Seventh Circuit’s holding in *Mach Mining* and examines how the court’s reasoning relates to other Seventh Circuit case law involving EEOC litigation. And finally, the fourth section argues that that the Seventh Circuit’s decision in *Mach* is supported by the statutory text and overall purpose of Title VII.

²¹ *Id.* at 173.

²² *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (U.S. 1977) (quoting 118 CONG. REC. 1068-1069 (1972)).

²³ *See Mach*, 738 F.3d at 172.

²⁴ *Id.* at 180. *Cf. Alexander v. Sandoval*, 121 S. Ct. 1511, 1521 (2001) (“Statutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’”) (quoting *California v. Sierra Club*, 101 S.Ct. 1775 (1981)).

I. THE CONCILIATION REQUIREMENT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII of the Civil Rights Act of 1964, the EEOC may bring suit against employers who engage in discriminatory employment practices.²⁵ Before filing suit, however, the EEOC must engage in conciliation efforts with the employer.²⁶ That is, once the EEOC has reasonable cause to believe an employer is engaging in discriminatory practices, it must try to reach an out-of-court agreement with the employer to end such practices.²⁷ If the EEOC is unable to reach a conciliation agreement that is acceptable to the Commission, the Commission may then file an employment discrimination lawsuit against the employer.²⁸

Section 2000e-5 of Title VII explains the process by which the EEOC handles allegations of employment discrimination and reads, in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice *by informal methods of conference, conciliation, and persuasion*. Nothing said or

²⁵ 42 U.S.C., § 2000e-5(b); see Note, *Judicial Responses to the EEOC's Failure to Attempt Conciliation*, 81 MICH. L. REV. 433, 441 (1982).

²⁶ 42 U.S.C.A., § 2000e-5(b).

²⁷ 42 U.S.C.A., § 2000e-5(b).

²⁸ 42 U.S.C.A., § 2000e-5(b).

done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. . . . If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent. . . .²⁹

Either an aggrieved employee or a member of the Commission may file a “charge” of discrimination with the EEOC.³⁰ When the EEOC receives such a charge, it must notify the employer of the grievance within ten days.³¹ Then, the EEOC must investigate whether reasonable cause exists to support the allegation.³² If, after investigating, the EEOC determines there is not reasonable cause to believe that the allegation is true, it must dismiss the charge.³³ If, however, the EEOC determines that reasonable cause exists that the allegation is true, the conciliation process is triggered.³⁴ The EEOC must then “endeavor to eliminate . . . unlawful employment practices by informal methods of conference, conciliation, and persuasion.”³⁵ If the EEOC is “unable to secure from the respondent a conciliation agreement acceptable to the Commission,” the Commission may then file a lawsuit against the employer within thirty days after the date that the charge was filed.³⁶

²⁹ *Id.* (emphasis added).

³⁰ *Id.*; see Anthony P. Zana, *A Pragmatic Approach to EEOC Misconduct: Drawing A Line on Commission Bad Faith in Title VII Litigation*, 73 MISS. L.J. 289, 292–94 (2003).

³¹ Zana, *supra* note 30.

³² 42 U.S.C.A., § 2000e-5(b).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Additionally, Section 2000e(f)(1) of Title VII provides an alternative remedy by which an aggrieved employee can seek relief if the employee is dissatisfied with the EEOC's progress in investigating, conciliating, or prosecuting his or her charge.³⁷ This section reads, in relevant part:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge[,] . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, . . . a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.³⁸

That is, a complainant may circumvent the EEOC's procedures and seek relief through a private action in district court.³⁹ This private right of action, however, does not arise until the employee receives a "right to sue" letter from the EEOC, which states that the EEOC does not intend to file suit against the employer.⁴⁰ The EEOC is required to send this letter within 180 days after the date the charge was filed.⁴¹ The Supreme Court examined this provision in *Occidental Life Insurance of California v. EEOC*, wherein the Court held that the 180-day limitation was not a statute of limitations on EEOC enforcement suits, but rather addressed an alternative enforcement procedure.⁴² The Court stated that "[t]he retention of the private right of action . . . is designed to make sure that the person aggrieved does not have to

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Doe v. Oberweis Dairy*, 456 F.3d 704, 708 (7th Cir. 2006).

⁴¹ *Stewart v. EEOC*, 611 F.2d 679, 682 (7th Cir. 1979).

⁴² 432 U.S. 355, 361 (1977).

endure lengthy delays if the Commission . . . does not act with due diligence and speed.”⁴³ The Court added that this provision “allow[s] the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.”⁴⁴

Notably, as originally enacted, Title VII only granted individual employees the right to sue an employer for discrimination, and the EEOC could *only* seek voluntary compliance through conciliation.⁴⁵ Over time, however, voluntary compliance proved elusive, as more than half of the EEOC’s conciliation efforts were unsuccessful.⁴⁶ Consequently, Congress enacted the Equal Opportunity Act of 1972, which amended Title VII to permit the EEOC to sue employers for engaging in discriminatory practices.⁴⁷ Under the revised Act, the EEOC’s power to sue employers is conditioned on its inability to “secure from the respondent a conciliation agreement acceptable to the EEOC.”⁴⁸ In other words, the EEOC must make conciliation efforts, and may only sue an employer if it is unsatisfied with the results of the conciliation process. Title VII also requires that the conciliation process remain confidential, stating that “nothing said or done and as part of such informal endeavors may be made public by the Commission, its officers or employers, or used as evidence in a subsequent proceeding without the written consent of the person concerned.”⁴⁹ The statute provides no additional information about the requirements of the conciliation process.⁵⁰

The conciliation process itself has several benefits.⁵¹ It gives the employer an opportunity to explain or justify its conduct before

⁴³ *Id.* at 365–66 (quoting 118 CONG. REC. 1068–1069 (1972)).

⁴⁴ *Occidental Life*, 432 U.S. at 365.

⁴⁵ *Judicial Responses to the EEOC’s Failure to Attempt Conciliation*, *supra* note 25, at 441–42.

⁴⁶ *EEOC v. CRST Van Expedited*, 679 F.3d 657, 682 (8th Cir. 2012) (quoting *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947 (8th Cir. 1974)).

⁴⁷ 42 U.S.C. § 2000e(f); *see CRST Van Expedited*, 679 F.3d at 682.

⁴⁸ *CRST Van Expedited*, 679 F.3d at 682.

⁴⁹ 42 U.S.C. § 2000e-5(b).

⁵⁰ *See* 42 U.S.C. § 2000e-5(b).

⁵¹ Note, *III. Procedure Under Title VII*, 84 HARV. L. REV. 1195, 1200 (1971).

litigation receives widespread public attention.⁵² Additionally, conciliation is generally less expensive and less time consuming than litigation.⁵³ As the Seventh Circuit noted, the purpose of conciliation and other pre-suit requirements is to “encourage the complainant and the employer . . . to resolve their dispute informally.”⁵⁴ The court also noted that informal resolutions aid in “reducing the burden on the courts of enforcing Title VII.”⁵⁵ Despite the theoretical advantages of conciliation, however, EEOC conciliation has been less than a complete success.⁵⁶ To date, the EEOC has been unable to achieve even partially successful conciliation in more than half the cases in which it was attempted.⁵⁷

While conciliation undoubtedly has multiple benefits and is clearly a prerequisite to the EEOC’s authority to file a lawsuit against an employer, the EEOC is granted great deference in defining the parameters and procedures that comprise conciliation. In fact, commentators have noted that the EEOC’s conciliation and investigation process, “probably require the most discretion by EEOC officers and, not coincidentally, are often the most vulnerable for an employer to challenge.”⁵⁸ Indeed, the conciliation process has been the subject of much litigation, and circuit courts sharply split on whether, and to what extent, the conciliation process is subject to judicial review.⁵⁹ The Seventh Circuit’s holding in *Mach* deepened and complicated the circuit split, as explained below.⁶⁰

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Doe v. Oberweis Dairy*, 456 F.3d 704, 708 (7th Cir. 2006).

⁵⁵ *Id.* at 708–09.

⁵⁶ *III. Procedure Under Title VII*, *supra* note 51, at 1200.

⁵⁷ *Id.*

⁵⁸ *Zana*, *supra* note 30, at 292–94.

⁵⁹ *See EEOC v. Mach Mining*, 738 F.3d 171, 182 (7th Cir. 2013).

⁶⁰ *Id.*

II. CIRCUIT SPLIT

The Seventh Circuit stands alone in holding that the EEOC's conciliation process is not subject to any level of judicial review.⁶¹ Eight circuits have examined this issue, and each held or, at a minimum, assumed that the conciliation process is subject to *some* level of judicial review.⁶² Of these eight circuits, six have articulated specific standards of review, falling into two camps.⁶³ The first camp, comprised of the Fourth, Sixth, and Tenth Circuits, evaluates the conciliation process by asking generally whether the EEOC acted "reasonably" or in "good faith."⁶⁴ The second camp, comprised of the Second, Fifth and Eleventh Circuits, evaluates the conciliation under a more searching three-part inquiry.⁶⁵ This latter standard requires the

⁶¹ *Id.*

⁶² Petition for Writ of Certiorari at 13, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (No. 13-1019), 2014 WL 709677, at *8.

⁶³ *Id.* at 12-19. The Eighth and Ninth Circuits have found that the conciliation process is judicially reviewable, but neither Circuit has explicitly adopted a precise standard by which courts should review the process. *See, e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676-77 (8th Cir. 2012) (reviewing the adequacy of the EEOC's conciliation and investigation processes to determine whether the EEOC's case should be dismissed); *EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006) (permitting judicial review into the "EEOC's failure to satisfy its obligation to conciliate" to decide whether to award attorney's fees against the EEOC); *EEOC v. Bruno's Rest.*, 13 F.3d 285, 288-89 (9th Cir. 1993) (reviewing adequacy of conciliation efforts in context of request for attorney's fee award against the agency).

⁶⁴ Petition for Writ of Certiorari, *supra* note 62, at 12-13; *see, e.g.*, *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185-86 (4th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101-02 (6th Cir. 1984); *EEOC v. Zia Co.*, 582 F.2d 527, 532-34 (10th Cir. 1978).

⁶⁵ Petition for Writ of Certiorari, *supra* note 62, at 18; *see, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534-35 (2d Cir. 1996); *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 467-69 (5th Cir. 2009); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 106-07 (5th Cir. 1981); *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002-03 (5th Cir. 1980); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003).

EEOC: 1) to outline to the employer the reasonable cause for its belief that Title VII has been violated; 2) to offer an opportunity for voluntary compliance; and 3) to respond in a reasonable and flexible manner to the reasonable attitudes of the employer.⁶⁶

These eight circuits allow courts to review the EEOC's conciliation process,⁶⁷ even though Title VII mandates that the details of the conciliation process remain confidential.⁶⁸ This begs the question: how can a court make a determination regarding any aspect of the conciliation process if the court cannot probe into the details of that process? The eight circuits that allow for judicial review answer this question by drawing a distinction between review of the conciliation process, which they permit, and review of the substance of the EEOC's position, which they supposedly prohibit.⁶⁹ In *EEOC v. Zia Co.*, for example, the Tenth Circuit acknowledged that "a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide."⁷⁰ Nevertheless, the court determined that the EEOC's conciliation process was insufficient because the EEOC refused to re-open conciliation to resolve a dispute over the proposed conciliation agreement.⁷¹ In *Mach*, the Seventh Circuit stated that drawing this type of distinction between process and substance is "too fine a thread on which to hang judicial review"⁷² because it "slide[s] easily from review of the form of conciliation toward more substantive scrutiny."⁷³ The *Mach* court stated that review of the EEOC's conciliation efforts "would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers, not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless."⁷⁴

⁶⁶ Petition for Writ of Certiorari, *supra* note 62, at 18.

⁶⁷ *Id.* at 13.

⁶⁸ 42 U.S.C.A. § 2000e-5(b).

⁶⁹ *EEOC v. Mach Mining*, 738 F.3d 171, 175 (7th Cir. 2013).

⁷⁰ 582 F.2d 527, 533 (10th Cir. 1978).

⁷¹ *Id.* at 534.

⁷² *Mach Mining*, 738 F.3d at 184.

⁷³ *Id.*

⁷⁴ *Id.* at 177.

To the extent that circuits have attempted to justify their allowance of judicial review of the conciliation process, most have pointed generally to Congress's intention that the EEOC address discrimination through voluntary settlement.⁷⁵ The Eleventh Circuit, for example, has highlighted that Title VII's conciliation requirement "clearly reflects a strong congressional desire for out-of-court settlements of Title VII violations."⁷⁶ The Eighth Circuit echoed this sentiment, reasoning that "[a]lthough the EEOC enjoys wide latitude in investigating and filing lawsuits related to charges of discrimination, Title VII limits that latitude to some degree by plac[ing] a strong emphasis on administrative, rather than judicial, resolution of disputes."⁷⁷ The Seventh Circuit, however, was unpersuaded by these justifications, stating it was "skeptical that court oversight is necessary or that it encourages compliance rather than strategic evasion on the part of employers."⁷⁸ The Seventh Circuit opined that judicial review of the conciliation process would not encourage voluntary compliance with Title VII.⁷⁹ On the contrary, it would undermine conciliation by tempting employers "to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."⁸⁰ The court also pointed out that, even without judicial review, the conciliation process is subject to meaningful scrutiny.⁸¹ Namely, Congress can exert its influence on the EEOC through oversight hearings, adjustments to appropriations, and statutory amendments.⁸²

⁷⁵ *Id.* at 183.

⁷⁶ *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (citing *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir.1970)).

⁷⁷ *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (internal quotations omitted) (citing *U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08-CV-1780-IEG (PCL), 2011 WL 2784516, slip op. at *5 (S.D. Cal. July 14, 2011)).

⁷⁸ *Mach Mining*, 738 F.3d at 183.

⁷⁹ *Id.* at 178–79.

⁸⁰ *Id.*

⁸¹ *Id.* at 180.

⁸² *Id.*

Furthermore, the Seventh Circuit expressly rejected the “good faith” requirement imposed by the Fourth, Fifth, and Tenth Circuits.⁸³ In *Mach*, the defendant-employer argued that the National Labor Relations Act (NLRA) offers a template for how courts should analyze good faith in this context.⁸⁴ The Seventh Circuit rejected this argument because, unlike the NLRA, Title VII does not contain an explicit statutory command to employers and unions to negotiate in good faith.⁸⁵ Further, the *Mach* court stated that it is “difficult . . . to enforce such a duty, because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, or even a generous offer.”⁸⁶

Additionally, in *Mach*, the EEOC cited to the Congressional record in both its appellate brief and its motion for certification to support its argument that a “good faith” requirement is inconsistent with the language and intent of Title VII.⁸⁷ In both its brief and motion, the EEOC highlighted that a majority of senators who considered the matter disfavored judicial review of conciliation.⁸⁸ Senator Samuel Ervin, for example, found such a suggestion to be “inconceivable,” stating “I do not know . . . how a court could probe into the minds of the Commission [to determine] whether they did or did not, in good faith, decide that they would or would not work out a conciliation agreement.”⁸⁹ Senator Jacob Javits added that allowing

⁸³ *Id.* at 176

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 176 (citing *Doe v. Oberweis Dairy*, 456 F.3d 704, 711 (7th Cir. 2006)).

⁸⁷ Brief of Appellant at 11–17, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (No. 13-2456); Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b) at 10–11, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (No. 11-cv-00879-JPG-PMF).

⁸⁸ Brief of Appellant, *supra* note 87, at 13–16; Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b), *supra* note 87, at 10–11.

⁸⁹ Brief of Appellant, *supra* note 87, at 11. (quoting 118 Cong. Rec. 3807 (Feb. 14, 1972)); Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b), *supra* note 87, at 10. (quoting 118 Cong. Rec. 3807 (Feb. 14, 1972)).

judicial review would “introduce a totally different standard than anything encompassed by our laws or practice.”⁹⁰

By rejecting the “good faith” requirement, and refusing to subject conciliation to any level of judicial scrutiny, the *Mach* court sharply disagreed with its sister circuits. The court’s reasoning for this divergence is reviewed and analyzed below.

III. EEOC v. MACH MINING, LLC.

In *E.E.O.C. v. Mach Mining*, an employer-defendant sought dismissal of a discrimination suit on the grounds that the EEOC failed to comply with Title VII’s requirements.⁹¹ Namely, the employer alleged that the EEOC failed to engage in good faith conciliation before filing suit.⁹² The court held, however, that failure-to-conciliate was not grounds for dismissal on the merits because the conciliation process is not subject to judicial review.⁹³ This decision is consistent with the Seventh Circuit’s reluctance to allow courts to review and evaluate the adequacy of the EEOC’s pre-suit processes.⁹⁴ In *Mach*, the court defended its reasoning, stating that it was “consistent with our earlier cases rejecting similar attempts by employers to change the

⁹⁰ Brief of Appellant, *supra* note 87, at 11. (quoting 118 Cong. Rec. 3807 (Feb. 14, 1972)); Plaintiff EEOC’s Motion to Reconsider or to Certify Under 1292(b), *supra* note 87 at 10. (quoting 118 Cong. Rec. 3807 (Feb. 14, 1972))

⁹¹ *Mach Mining*, 738 F.3d at 171.

⁹² *Id.*

⁹³ *Id.* at 171–72.

⁹⁴ See *Doe v. Oberweis Dairy*, 456 F.3d 704, 709 (7th Cir. 2006) (refusing to review whether an employee cooperated during pre-suit proceedings); *EEOC v. Caterpillar, Inc.* 409 F.3d 831, 833 (7th Cir. 2005) (the “existence of probable cause to sue is generally and in this instance not judicially reviewable.”); *EEOC v. Elgin Teachers Assoc.*, 27 F.3d 292, 294 (7th Cir. 1994) (stating that the decision to file suit is within the sole discretion of the EEOC “rather than the judiciary”); *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984) (refusing to review the EEOC’s “no reasonable cause” determination); *Stewart v. EEOC*, 611 F.2d 679, 682 (7th Cir. 1979) (refusing to review the adequacy or timeliness of the EEOC’s pre-suit investigation and “reasonable cause” determination).

focus from their employment practices to the agency's pre-suit processes."⁹⁵

A. *Facts and Procedural History*

In early 2008, the EEOC received a charge of discrimination from a woman who claimed Mach Mining did not hire a number of coal miner applicants based on gender.⁹⁶ The EEOC investigated the charge and determined that there was reasonable cause to believe Mach Mining had, in fact, discriminated against a class of female job applicants at its mine near Johnston City, Illinois.⁹⁷ According to the EEOC, Mach Mining had never hired a single female for a mining-related position and did not even have a women's bathroom at its mining site.⁹⁸ In late 2010, the EEOC notified Mach Mining of its intent to begin formal conciliation efforts.⁹⁹ The parties discussed possible resolutions, but ultimately, the EEOC and Mach Mining did not reach a conciliation agreement.¹⁰⁰

In September 2011, the EEOC informed Mach Mining that the conciliation process was unsuccessful and that further conciliation efforts would be futile.¹⁰¹ Two weeks later, the EEOC filed its complaint against Mach Mining.¹⁰² The complaint alleged that Mach Mining violated Title VII by engaging in a pattern or practice of unlawful employment practices since at least January 1, 2006.¹⁰³ The

⁹⁵ *Mach Mining*, 738 F.3d at 181.

⁹⁶ *Id.* at 173.

⁹⁷ *Id.*

⁹⁸ EEOC v. Mach Mining, LLC, No. 11-cv-879-JPG-PMF, 2013 WL 319337, at *1 (S.D. Ill. Dec. 20, 2013), *rev'd*, 738 F.3d 171 (7th Cir. 2013); EEOC v. Mach Mining, LLC, No. 11-CV-879-JPG-PMF, 2013 WL 2177770 at *1 (S.D. Ill. Dec. 20, 2013).

⁹⁹ *Mach Mining*, 738 F.3d at 173.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ EEOC v. Mach Mining, No. 11-cv-879-JPG-PMF, 2013 WL 319337 (S.D. Ill. Dec. 20, 2013); EEOC v. Mach Mining, No. 11-cv-879-JPG-PMF, 2013 WL 2177770, at *1 (S.D. Ill. Dec. 20, 2013).

complaint also stated that the action was “authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended.”¹⁰⁴

Mach Mining’s answer to the complaint denied unlawful discrimination and asserted several affirmative defenses, one of which claimed that the suit should be dismissed because the EEOC failed to conciliate in good faith.¹⁰⁵ The EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is a valid affirmative defense to an employment discrimination suit.¹⁰⁶ The EEOC’s motion did not address the sufficiency of its conciliation efforts – rather, the EEOC only argued that Title VII did not authorize judicial review of the EEOC’s conciliation efforts.¹⁰⁷

The district court denied the EEOC’s motion, holding that courts should evaluate conciliation to the extent needed to “determine whether the EEOC made ‘a sincere and reasonable effort to negotiate.’”¹⁰⁸ The EEOC then filed a Motion to Reconsider or Certify for immediate appellate review.¹⁰⁹ In its motion, the EEOC characterized Mach Mining’s failure-to-conciliate defense as “an attempt to whittle away the class of women for whom the EEOC may obtain relief” for unlawful employment practices.¹¹⁰ Although the district court denied the EEOC’s Motion to Reconsider, it granted the EEOC’s Motion to Certify because the EEOC established the four

¹⁰⁴ Complaint at 1, *EEOC v. Mach Mining, LLC*, 738 F.3d at 171 (No. 11-cv-879-JPG-PM).

¹⁰⁵ *Mach Mining*, 738 F.3d at 173.

¹⁰⁶ *EEOC v. Mach Mining, LLC*, No. 11-cv-879-JPG-PMF, 2013 WL 319337 (S.D. Ill. Dec. 20, 2013); *EEOC v. Mach Mining, LLC*, No. 11-CV-879-JPG-PMF, 2013 WL 2177770, at *2.

¹⁰⁷ *Mach Mining*, 738 F.3d at 173.

¹⁰⁸ *EEOC v. Mach Mining, LLC*, No. 11-cv-879-JPG-PMF, 2013 WL 319337, at *5 (S.D. Ill. Jan. 28, 2013) (quoting *EEOC v. Menard, Inc.*, No. 08-cv-0655-DRH, 2009 WL 1708628, at *1 (S.D. Ill. June 17, 2009)).

¹⁰⁹ *EEOC v. Mach Mining, LLC*, No. 11-CV-879-JPG-PMF, 2013 WL 2177770, at *1.

¹¹⁰ Plaintiff EEOC’s Motion to Reconsider or to Certify Under 1292(b), *supra* note 87, at 1.

statutory criteria¹¹¹ for certification.¹¹² Accordingly, the court certified the following questions for immediate appellate review: whether courts may review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?¹¹³

The Seventh Circuit issued its opinion on December 20, 2013, holding that conciliation is not subject to any level of judicial review, and thus failure-to-conciliate is not a valid affirmative defense to the EEOC's unlawful employment discrimination suit.¹¹⁴ The Seventh Circuit's reasoning is explained and analyzed below.

On February 25, 2014, Mach Mining filed a Petition for Writ of Certiorari for the Seventh Circuit's decision to be reviewed by the United States Supreme Court.¹¹⁵

B. The Language of Title VII Does Not Authorize Judicial Review of the Conciliation Process

The *Mach* court stressed that Title VII contains no express provisions for judicial review of the EEOC's conciliation process and does not provide for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts.¹¹⁶ Highlighting the "precise,

¹¹¹ There are four statutory criteria for the grant of a section 1292(b): there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation. *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000).

¹¹² *EEOC v. Mach Mining, LLC*, No. 11-cv-879-JPG-PMF, 2013 WL 319337 (S.D. Ill. Dec. 20, 2013); *EEOC v. Mach Mining, LLC*, (No. 11-CV-879-JPG-PMF), 2013 WL 2177770, at *6 (S.D. Ill. Dec. 20, 2013).

¹¹³ *EEOC v. Mach Mining, LLC*, (No. 11-CV-879-JPG-PMF), 2013 WL 2177770, at *6 (S.D. Ill. Dec. 20, 2013).

¹¹⁴ *Mach Mining*, 738 F.3d at 184.

¹¹⁵ Petition for Writ of Certiorari, *supra* note 62.

¹¹⁶ *Mach Mining*, 738 F.3d at 174.

complex, and exhaustive nature”¹¹⁷ of Title VII, the court stated “this silence itself is compelling.”¹¹⁸ In the absence of an express authorization for judicial review, the court refused to read an implied authorization into Title VII because it is “incorrect to infer that Congress meant anything than what the text does say.”¹¹⁹ The EEOC also highlights this silence in its appellate brief, pointing out:

No provision specifically articulates what the EEOC must do besides attempt conciliation and decide whether the employer offered a conciliation agreement acceptable to the Commission. No provision authorizes judicial review of that decision. No provision declares what venue would hear challenges based on alleged failures to conciliate. No provision establishes what standard of review would apply in assessing the validity of that decision. And no provision articulates what the remedy should be if the EEOC fails to fulfill its duty to engage in conciliation.¹²⁰

Because the EEOC neither expressly authorizes judicial review, nor provides guidance as to how the conciliation process should be reviewed, the court infers Congress did not intend conciliation to be reviewable. Rather, the court need only verify whether the EEOC pleaded on the face of its complaint that it complied with Title VII’s requirements.¹²¹

The EEOC also argued that Title VII’s failure to require a formalized record of the conciliation process is further evidence that Congress did not intend to authorize judicial review of conciliation.¹²²

¹¹⁷ *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530, (2013)).

¹¹⁸ *Mach Mining*, 738 F.3d at 174.

¹¹⁹ *Id.*

¹²⁰ Brief of Appellant, *supra* note 87, at 7–8

¹²¹ *Mach Mining*, 738 F.3d at 184.

¹²² Brief of Appellant, *supra* note 87, at 10.; *see ICC v. Locomotive Eng’rs*, 482 U.S. 270, 283-84 (1987) (rejecting judicial review of denials of reconsideration because of the lack of consistent recordkeeping, reasoning that review was not

The EEOC used the Congressional record to support this argument, noting that Senator Williams voiced concern that review of conciliation would be problematic because there would be no record of the informal conferences, phone calls, and meetings.¹²³ Thus, courts would be forced to review an incomplete record that does not accurately represent what occurred.¹²⁴ This reasoning is consistent with the Seventh Circuit's previous refusals to review the adequacy of the EEOC's statutorily-required pre-suit actions, especially when statutory text is contraindicative of such review.¹²⁵

1. *Stewart v. EEOC*

In *Stewart v. EEOC*, several employees sought review of the EEOC's alleged failure to make timely reasonable cause determinations of their charges.¹²⁶ The employees claimed that the EEOC failed to satisfy the procedural requirements of Title VII by neglecting their charges of employment discrimination by allowing the charges to remain "uninvestigated, unprocessed, and without reasonable cause determinations for one to more than two years."¹²⁷ The Seventh Circuit, however, refused to probe into the EEOC's pre-suit procedures, reasoning that Title VII does not authorize review of the challenged agency actions by the EEOC.¹²⁸ The Court relied heavily on the language of Title VII, stating that "[h]ad Congress intended a remedy of enforcement against the EEOC, the provisions of

workable because "the vast majority of denials of reconsideration . . . are made without a statement of reasons").

¹²³ 118 Cong. Rec. 3806 (Feb. 14, 1972).

¹²⁴ Brief of Appellant, *supra* note 87, at 10.

¹²⁵ See *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 181 (7th Cir. 2013) ("[The Seventh Circuit's] rejection of the [failure-to-conciliate] defense is consistent with [the Seventh Circuit's] earlier cases rejecting similar attempts by employers to change the focus from their employment practices to the agency's pre-suit processes.")

¹²⁶ *Stewart v. EEOC*, 611 F.2d 679, 683 (7th Cir. 1979).

¹²⁷ *Id.* at 681.

¹²⁸ *Id.*

[Title VII] would have so indicated.”¹²⁹ This reasoning is consistent with the court’s reasoning in *Mach*. In both cases, the Seventh Circuit adhered to the plain text of Title VII and refused to read an implied remedy into the statute.¹³⁰

2. *McCottrell v. EEOC*

In *McCottrell v. EEOC*, the Seventh Circuit refused to review the EEOC’s finding that there was no reasonable cause to believe that an employee’s discrimination charge was true.¹³¹ After the EEOC made its “no reasonable cause” determination, the employee filed suit against his employer and eventually reached a settlement.¹³² The employee then sued the EEOC, arguing that the settlement was evidence that the EEOC’s “no reasonable cause” determination was erroneous.¹³³ The Seventh Circuit, however, refused to review the EEOC’s finding, holding that “Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge.”¹³⁴ This reasoning illustrates the Seventh Circuit’s continued refusal to allow for judicial review of the EEOC’s pre-suit processes where Title VII does not expressly allow for such review.

3. *Doe v. Oberweis Dairy*

In *Doe v. Oberweis Dairy*, twenty-seven years after *McCottrell*, the Seventh Circuit rejected a defendant-employer’s argument that an employee’s failure to cooperate with the EEOC “in good faith” during pre-suit proceedings entitled the employer to summary judgment.¹³⁵ Although Title VII requires that complainants

¹²⁹ *Id.* at 682.

¹³⁰ *Id.*; *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 174 (7th Cir. 2013).

¹³¹ *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Doe v. Oberweis Dairy*, 456 F.3d 704, 709 (7th Cir. 2006).

cooperate with investigations, the court refused to accept that the “good faith” cooperation was a prerequisite to suit or that alleged failure to cooperate could be an affirmative defense.¹³⁶ The court refused to review the employee’s pre-suit activities, reasoning that Title VII provided no basis to review whether the employee cooperated in “good-faith.”¹³⁷ The court added that reading a good-faith requirement into the statute in the absence of express statutory language authorizing such a requirement would be “adventurous” and would “distress originalists.”¹³⁸ The court also warned that, “[t]o allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute.”¹³⁹

In *Mach*, the EEOC cited the reasoning of *Oberweis* in its appellate brief, stating that the Seventh Circuit “could have been writing about review of conciliation when it offered its reasons for rejecting review of an employee’s pre-suit activities.”¹⁴⁰ Just as there is no statutory basis for a “good faith” requirement regarding an employee’s cooperation with the EEOC, there is also no basis for a “good faith” requirement regarding the EEOC’s conciliation efforts.¹⁴¹ The *Oberweis* court opined that any risk that employees will fail to cooperate with the EEOC, thereby “thwart[ing] the conciliation process and . . . thrust[ing] additional cases on the federal court is a slight one.”¹⁴² Similarly, refusal to subject conciliation to judicial scrutiny will not substantially thwart conciliation.¹⁴³ As the *Mach* court noted, the EEOC is constrained by the “practical limitations of budget and personnel,” and thus “has its own powerful incentives to conciliate.”¹⁴⁴

The Seventh Circuit consistently refuses to permit judicial review of the EEOC’s statutorily-mandated processes when Title VII

¹³⁶ *Id.*

¹³⁷ *Id.* at 711.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Brief of Appellant, *supra* note 87, at 14.

¹⁴¹ See *EEOC v. Mach Mining LLC*, 738 F.3d 171, 176–77 (7th Cir. 2013).

¹⁴² *Oberweis Dairy*, 456 F.3d at 710.

¹⁴³ *Mach Mining*, 738 F.3d at 180.

¹⁴⁴ *Id.*

does not expressly authorize such review.¹⁴⁵ Nevertheless, the *Mach* court does not rest solely upon statutory silence.¹⁴⁶ On the contrary, the court argues that Title VII effectively *prohibits* such review.¹⁴⁷ More specifically, the court reasoned that Title VII's requirement that the details of the conciliation process remain confidential in combination with its provision that the EEOC retain complete deference in the conciliation process, are contraindicative of judicial review.¹⁴⁸

C. Title VII's Confidentiality Provision Contraindicates Judicial Review of Conciliation

The *Mach* court reasoned that judicial review of the conciliation process conflicts directly with the confidentiality provision of Title VII.¹⁴⁹ The court concluded that Title VII effectively prohibits judicial review of the conciliation process because it requires the details of conciliation to remain confidential.¹⁵⁰ Title VII states “[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.”¹⁵¹ In fact, violators of this strict confidentiality requirement may even be subject to criminal prosecution.¹⁵²

The *Mach* court reasoned that, because of this provision, a court would not have access to any of the relevant information necessary to evaluate any aspect of the process, and thus Title VII contraindicates judicial review.¹⁵³ The court pointed out that Title VII contains no exception allowing information about conciliation to be

¹⁴⁵ See *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013).

¹⁴⁶ *Id.* at 174.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 174–75.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 42 U.S.C.A., § 2000e-5(b).

¹⁵² 42 U.S.C.A., § 2000e-5(b).

¹⁵³ *Mach Mining*, 738 F.3d 174–75 (7th Cir. 2013).

admitted for collateral purposes, such as to satisfy a court that conciliation occurred or that the EEOC's conciliation efforts were sufficient.¹⁵⁴ Therefore, it would be impossible for courts to meaningfully evaluate any conciliation process because Title VII's confidentiality requirement prohibits the court from accessing any information about the conciliation process.¹⁵⁵ Essentially, the court would be required to evaluate conciliation without any evidence.¹⁵⁶ The court thus concluded that judicial review of the conciliation process directly contradicts Title VII's confidentiality requirement.¹⁵⁷

In *Mach*, the district court resolved this contradiction by interpreting the statute as allowing information about the conciliation process to be introduced during litigation in certain, limited circumstances.¹⁵⁸ The district court acknowledged that the statute prohibits the introduction of conciliation matters into evidence "to prove or disprove a claim on the merits," but stated that the statute "does not prohibit the introduction of conciliation matters in collateral proceedings such as contesting the EEOC's conciliation efforts."¹⁵⁹ Essentially, the district court held that Title VII contains an implied exception to its confidentiality requirement, which allows for the information about the conciliation process to be introduced for non-merit purposes in collateral hearings.¹⁶⁰ The EEOC disagreed, stating in its appellate brief that, "even if the information is used in a non-merits manner," allowing such information to make its way into litigation "would risk a decrease in the open communication necessary to reach voluntary settlements during the conciliation process."¹⁶¹ That is, compromising confidentiality would chill conciliation negotiations because participants would be concerned that their statements,

¹⁵⁴ *Id.* at 175.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 174–175.

¹⁵⁸ EEOC v. Mach Mining, LLC, No. 11 CV 879 JPG PMF, 2013 WL 319337, at *2 (S.D. Ill. Dec. 20, 2013), *rev'd*, 738 F.3d 171 (7th Cir. 2013).

¹⁵⁹ EEOC v. Mach Mining, LLC, No. 11 CV 879 JPG PMF, 2013 WL 2177770, at *4 (S.D. Ill. Dec 20, 2013).

¹⁶⁰ *Id.*

¹⁶¹ Brief of Appellant, *supra* note 87, at 9,

including settlement offers, would later be used against them during litigation.¹⁶² The EEOC further argued that, “[i]f Congress envisioned judicial review, it would make no sense to proscribe parties from disclosing conciliation information to the court.”¹⁶³ The Seventh Circuit agreed with the EEOC, and reasoned that Title VII’s confidentiality requirement renders judicial review of the conciliation process impractical because a court would not have access to the information necessary to make a meaningful determination.¹⁶⁴

D. The EEOC’s Broad Discretion in Defining and Administering the Conciliation Process is Contraindicative to Judicial Review of Conciliation

The *Mach* court also stressed that Title VII gives great deference to the EEOC regarding the conciliation process.¹⁶⁵ While the statute requires the EEOC engage in conciliation efforts prior to filing a lawsuit, it essentially allows the EEOC to internally define and administer its conciliation efforts.¹⁶⁶ The court stated “Title VII includes express statutory language making it clear that conciliation is an informal process entrusted solely to the EEOC’s expert judgment.¹⁶⁷ The court reasoned that such an “open-ended” grant of power to an administrative agency is not subject to judicial review.¹⁶⁸

Title VII uses general language that only requires that the EEOC “endeavor to eliminate” discriminatory practices through “informal methods of conference, conciliation, and persuasion.”¹⁶⁹ As the court noted, the statute does not further define the conciliation process, nor does it address “just how many offers, counteroffers, conferences, or phone calls” would be necessary to satisfy the

¹⁶² *Id.*

¹⁶³ *Id.* at 9.

¹⁶⁴ EEOC v. Mach Mining, LLC, 738 F.3d 171, 175 (7th Cir. 2013).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 174.

¹⁶⁸ *Id.* at 175.

¹⁶⁹ 42 U.S.C.A., § 2000e-5(b).

statute.¹⁷⁰ Further, Title VII “says nothing about the informal methods the EEOC is required to use . . . or how hard the agency should ‘endeavor’ to pursue them.”¹⁷¹ The statute also “gives no description of what a negotiated settlement should look like beyond eliminating the discriminatory conduct.”¹⁷² Furthermore, the court reasoned that the word “informal” indicates that Congress intended to maintain flexibility in the conciliation process and that the Commission would determine the substantive details of the process.¹⁷³

The court also stressed that Title VII gives the Commission complete discretion to accept or reject an employer’s offer for any reason.¹⁷⁴ The EEOC can bring suit when it is “unable to secure from the respondent a conciliation agreement acceptable *to the Commission*.”¹⁷⁵ Thus, the EEOC is the sole arbiter of whether a proposed conciliation agreement is “acceptable.”¹⁷⁶ Accordingly, even if the EEOC engaged in extensive conciliation efforts, and the employer complied throughout the process, the EEOC could still file suit if, for any reason at all, it was unsatisfied with outcome of the conciliation process.¹⁷⁷ The *Mach* court characterized the statute as “an instruction to the EEOC to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable.”¹⁷⁸ Further, as the EEOC argued in its appellate brief, the statute’s command that the conciliation process be “informal,” indicates that the conciliation process is completely within the EEOC’s domain.¹⁷⁹ The *Mach* court agreed, stating “[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text.”¹⁸⁰ The *Mach*

¹⁷⁰ *Mach Mining*, 738 F.3d at 175.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 174.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 176.

¹⁷⁸ *Id.*

¹⁷⁹ Brief of Appellant, *supra* note 86, at 10.

¹⁸⁰ *Mach*, 738 F.3d at 174.

court's reasoning is consistent with other Seventh Circuit cases that highlight the EEOC's broad discretion and authority regarding pre-suit proceedings.¹⁸¹

1. EEOC v. Elgin Teachers Association

In *EEOC v. Elgin Teachers Association*, the EEOC sued a teachers union for damages related to a collective bargaining agreement that the Commission believed was discriminatory.¹⁸² Even though the school district voluntarily changed the objectionable portions of the agreement, the EEOC still filed suit, seeking damages.¹⁸³ The union claimed the EEOC “lacked the right” to file suit because the union voluntarily complied with the requirements of Title VII during the conciliation process.¹⁸⁴ The court rejected this argument, stating that the decision to file suit was within the sole discretion of the EEOC.¹⁸⁵

The court found that the EEOC had authority to file suit merely because “it failed to get all of what it wanted” during the conciliation process.¹⁸⁶ Namely, the EEOC sought monetary relief, which the teachers association was unwilling to provide.¹⁸⁷ In rendering its decision, the court noted that the EEOC's decision to sue the teachers association was a “peculiar choice.”¹⁸⁸ The court found the decision to be peculiar because, in addition to the fact that the teachers association had already changed the objectionable provisions of the collective bargaining agreement, success in litigation for monetary relief would “ensure that back pay would come from the teachers' own pockets.”¹⁸⁹ Still, the court unambiguously stated that “[w]hether litigating to back

¹⁸¹ See, e.g., *EEOC v. Elgin Teachers Assoc.*, 27 F.3d 292, 293 (7th Cir. 1994); *EEOC v. Caterpillar, Inc.* 409 F.3d 831, 832–33 (7th Cir. 2005).

¹⁸² *Elgin Teachers Assoc.*, 27 F.3d at 293.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 294.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* .

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 293–94.

¹⁸⁹ *Id.*

up its demand was prudent is . . . a matter for the conscience of the person who authorized the suit, rather than for the judiciary.”¹⁹⁰

In *Mach*, the court cited its reasoning in *Elgin Teachers Association*, and stated that “the same reasoning applies to judicial review of conciliation efforts.”¹⁹¹ That is, the conciliation process is subject to judicial review because the entire process is within the sole discretion of the EEOC.¹⁹² Furthermore, the EEOC has full authority to file suit after conciliation, even when, as in *Elgin Teachers Association*, the employer voluntarily complies with Title VII.¹⁹³ Accordingly, the *Mach* court reasoned that it would be futile to probe into the adequacy of conciliation when the EEOC has full authority to reject even the most generous conciliation offers.¹⁹⁴ Rather, the EEOC need only plead its compliance with Title VII in its complaint, and provide the employer with an opportunity make offers of voluntary compliance.¹⁹⁵

2. EEOC v. Caterpillar, Inc.

Similarly, in *EEOC v. Caterpillar, Inc.*, the Seventh Circuit held that the EEOC’s pre-suit investigation and reasonable cause determination regarding a discrimination charge were not judicially reviewable.¹⁹⁶ In *Caterpillar*, a female employee filed a charge with the EEOC, claiming that she was fired for spurning her supervisor’s sexual advances.¹⁹⁷ The EEOC sent a notice to the employer, stating that EEOC had “reasonable cause to believe that Caterpillar, the employer, discriminated against [the claimant] *and a class of female*

¹⁹⁰ *Id.* at 294.

¹⁹¹ *EEOC v Mach Mining, LLC*, 738 F.3d 171, 181 (7th Cir. 2013).

¹⁹² *Id.* at 176 (“The parties here agree that . . . the EEOC is free to refuse an offer that might appear fair or even generous to a neutral observer.”).

¹⁹³ *Id.* at 184 (“all parties acknowledge that the statute grants the EEOC discretion to reject any particular settlement offer . . .”).

¹⁹⁴ *Id.* at 175.

¹⁹⁵ *Id.* at 184.

¹⁹⁶ *EEOC v. Caterpillar, Inc.* 409 F.3d 831, 833 (7th Cir. 2005).

¹⁹⁷ *Id.* 831.

employees.”¹⁹⁸ Caterpillar argued that the latter class-wide allegation was unrelated to the claimant’s original charge, and moved for summary judgment on the theory that the EEOC’s lawsuit went beyond the scope of the investigation required by Title VII.¹⁹⁹ The Seventh Circuit affirmed denial of summary judgment, holding that the “existence of probable cause to sue is generally and in this instance not judicially reviewable.”²⁰⁰

The court reasoned that a nexus between the initial charge and an EEOC’s suit is only a concern when the suit is brought by a private party, not when the suit is brought by the EEOC itself.²⁰¹ This is because, “if a private party were permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the Commission’s informal procedures for resolving those charges . . . would be bypassed, in derogation of the statutory scheme.”²⁰² That is, if the EEOC was unaware of certain allegations of discriminatory conduct, it could not investigate or conciliate those allegations before filing suit as required by Title VII. When the EEOC is the plaintiff, however, this is not a concern.²⁰³ As the court noted, if the EEOC’s “investigation turns up additional violations, the Commission can add them to its suit.”²⁰⁴ Therefore, when the suit is brought by the EEOC itself, “the suit is not confined to claims typified by those of the charging party.”²⁰⁵

The court’s reasoning in *Caterpillar* reflected the Commission’s wide discretion and considerable authority when deciding whether to file suit against an employer. The Commission is free to determine the parameters of its investigation and to decide, based on that investigation, which claims to include in a complaint if it decides to file suit.²⁰⁶ Citing the reasoning in *Caterpillar*, the *Mach*

¹⁹⁸ *Id.* at 832 (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 833.

²⁰¹ *Id.* at 832–33.

²⁰² *Id.*

²⁰³ *Id.* at 833.

²⁰⁴ *Id.* at 832.

²⁰⁵ *Id.* at 833.

²⁰⁶ *Id.* at 832.

court stated “[n]othing in the language of Title VII or our past case law invites courts to review the agency’s finding of probable or reasonable cause, and the same is true of its approach to conciliation.”²⁰⁷ Conciliation, like the EEOC’s other pre-suit procedures, is within the discretion of the EEOC, and is thus not subject to judicial review.²⁰⁸ Accordingly, the Seventh Circuit characterized the conciliation process as an opportunity for the employer to make offers of voluntarily compliance with EEOC standards, with the EEOC retaining complete discretion over whether such offers are sufficient to preclude litigation.²⁰⁹ This type of process, in which one party has absolute final authority, does not lend itself to judicial review.²¹⁰

IV. CONCLUSIONS

The purpose of Title VII’s conciliation requirement is not to create a hurdle that the EEOC must overcome before it can file an employment discrimination lawsuit.²¹¹ Rather, the requirement is best characterized as a procedural formality that gives *the employer* an opportunity to avoid litigation by voluntarily complying with Title VII’s requirements.²¹² Furthermore, allowing judicial review of the conciliation process would invite employers to “use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute.”²¹³ The court warned that “the potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation.”²¹⁴ Employers would thus be tempted to “turn what was meant to be an informal

²⁰⁷ EEOC v Mach Mining, LLC, 738 F.3d 171, 181 (7th Cir. 2013).

²⁰⁸ *Id.*

²⁰⁹ *See id.* at 176–79.

²¹⁰ *Id.* at 175 (“Such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit.”).

²¹¹ *See id.* at 180.

²¹² *See id.* at 176–79.

²¹³ *Id.* at 178.

²¹⁴ *Id.* at 179.

negotiation into the subject of endless disputes over whether the EEOC did enough before going to court.”²¹⁵

As the EEOC’s Appellate Attorney Eric Harrington stated, the *Mach* decision “permit[s] the district court to address the actual merits of this case, and enable the Commission to focus its efforts and resources on enforcing the laws against discrimination.”²¹⁶ Gregory Gochanour, the EEOC’s supervisory trial attorney for the Chicago District Office, echoed this sentiment, stating that the *Mach* decision “will compel all parties to focus on the issue of whether or not there actually was employment discrimination.”²¹⁷ Additionally, even without judicial review, the EEOC’s conciliation efforts are still subject to meaningful scrutiny because “Congress can exert its influence on the EEOC through oversight hearings, adjustments appropriations, and statutory amendments.”²¹⁸

Moreover, Title VII already provides an “all-purpose remedy” by which the EEOC’s alleged shortcomings may be addressed.²¹⁹ Namely, Title VII provides that, if an employee-complainant is dissatisfied with the EEOC’s progress regarding the employee’s charge of discrimination, the employee can “circumvent the EEOC procedures and seek relief through a private enforcement action in a district court.”²²⁰ This remedy does not include judicial review of the EEOC’s pre-suit procedural actions.²²¹ Indeed, the Seventh Circuit has explicitly refused to read any additional remedies into the statute, stating “we do not think Congress could have been more clear in expressing its intent that the private right of action . . . is an adequate remedy in a court for the alleged shortcomings in the EEOC’s

²¹⁵ *Id.* at 178–79.

²¹⁶ EEOC, *EEOC In Landmark Ruling, Seventh Circuit Holds Employers Cannot Challenge EEOC Conciliation*, available at <http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm> (Dec. 20, 2013).

²¹⁷ *Id.*

²¹⁸ *Id.* at 180.

²¹⁹ *Stewart v. EEOC*, 611 F.2d 679, 683 (7th Cir. 1979).

²²⁰ *Id.* at 682

²²¹ *Id.* at 683.

handling of the plaintiffs' charges."²²² Therefore, Title VII already provides a means by which the EEOC's alleged shortcomings may be remedied—namely, the private right of action conditioned upon a 180-day waiting period.²²³ This is the sole remedy for addressing the EEOC's shortcomings, and it does not include judicial review of conciliation.²²⁴

Notably, while Title VII provides a remedy for *employee-complainants* who are dissatisfied with the EEOC's execution of its administrative procedures, it provides no such a remedy for *employers* who are dissatisfied with the same procedures.²²⁵ This omission indicates that Congress never intended an employer to have such a remedy.²²⁶ As the Supreme Court stated in *Occidental Life*, "the individual's rights to redress are paramount under the provisions of Title VII [so] it is necessary that all avenues be left open for quick and effective relief."²²⁷ The purpose of Title VII is to protect employees, not employers, especially when the EEOC has already investigated the employer and has found reasonable cause to believe that the employer is engaging in discriminatory employment practices.²²⁸ As the *Mach* court noted, "[t]here is no indication that Title VII's directive to conciliate was for the special benefit of the employers or that they have a right to conciliation."²²⁹ Rather, "Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers."²³⁰ Simply put, judicial review

²²² *Id.* (quoting *Hall v. EEOC*, 456 F.Supp. 695, 701 (N.D.Cal.1978)) (internal quotation marks omitted).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 682 ("[h]ad Congress intended a remedy of enforcement against the EEOC, the provisions of [Title VII] would have so indicated.").

²²⁶ *EEOC v Mach Mining, LLC*, 738 F.3d 171, 180 (7th Cir. 2013).

²²⁷ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (U.S. 1977) (quoting 118 Cong. Rec. 1068-1069 (1972)).

²²⁸ *Mach Mining*, 738 F.3d at 180.

²²⁹ *Id.*

²³⁰ *Id.*

of the conciliation process “does not fit well with the broader statutory scheme of Title VII.”²³¹

Moreover, the *Mach* court also noted that dismissal of a case on its merits would be “too final and drastic a remedy for any procedural deficiency in conciliation.”²³² This reasoning is consistent with the Supreme Court’s acknowledgement that the individual’s right to redress is “paramount” under Title VII.²³³ Title VII’s conciliation requirement was not meant to insulate employers from litigation. Rather, Title VII’s conciliation requirement provides another “avenue” by which *an employee* may obtain “quick and effective relief.”²³⁴ As the EEOC’s General Counsel, David Lopez, stated in regards to the *Mach* decision, the Seventh Circuit “carefully applied the letter of the law . . . in a way that promotes Title VII’s goals, protects victims of discrimination, and preserves the EEOC’s critical law-enforcement prerogatives.”²³⁵

²³¹ *Id.* at 178.

²³² *Id.* at 184.

²³³ *Id.* at 180.

²³⁴ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (U.S. 1977) (quoting 118 Cong. Rec. 1068-1069 (1972)).

²³⁵ EEOC, *EEOC In Landmark Ruling, Seventh Circuit Holds Employers Cannot Challenge EEOC Conciliation*, available at <http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm> (Dec. 20, 2013).